

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

RICHARD SIRGINSON,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

) Case No. DSEP-01-0008

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held in the Board Room at the Everett Community College in Everett, Washington, on June 3, 2003. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Richard Sirginson was present and was represented by Richard Pope, Jr., Attorney at Law. Mickey Newberry, Assistant Attorney General, represented Respondent Department of Labor and Industries.

1.3 **Nature of Appeal.** This is an appeal from a disability separation.

1.4 **Citations Discussed.** WAC 358-30-170; Smith v. Employment Security Dept., PAB No. S92-002 (1992); WAC 356-35-010(1); WAC 356-05-120.

II. FINDINGS OF FACT

2.1 Appellant Richard Sirginson was a permanent employee for Respondent Department of Labor and Industries. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on September 28, 2001.

2.2 Appellant worked as an Industrial Hygienist 2 with the Department of Labor and Industries from 1992 until his disability separation on October 29, 2001. In his position, Appellant performed surveys of employer workplaces to detect and assess existing and potential health hazards. Appellant's position required him to work a regular schedule, perform complex inspections, manage multiple inspection assignments, prepare reports, and meet required production goals and legal deadlines.

2.3 The essential functions of Appellant's position were identified as:

- Conduct prep work before beginning inspection
- Conduct on-site inspection activity
- Write report – includes associated research as needed
- Communicate with internal and external customers
- Participate in appeal process
- Attend professional development training and staff meetings
- Stay current with administrative paperwork

2.4 Appellant experienced problems with preparing inspection reports in a timely manner from the time he began working for the Department of Labor and Industries. The agency had an established goal that inspection reports were to be turned in within 48 days after the inspection.

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2 2.5 Appellant managed to significantly improve his production rate for approximately one year,
3 and then his production rate dropped to approximately half. In an attempt to assist Appellant, the
4 agency sent him to a time management training class. However, Appellant continued to experience
5 problems with timeliness and the ability to focus on his work despite his intense desire to overcome
6 his decreased work performance.

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8 2.6 Appellant's supervisor, Robert Parker, began to meet with Appellant several times a day to
9 coach and assist him in accomplishing his job duties. The meetings appeared to help Appellant for
10 a while. However, during the last five years of Appellant's employment, his timeliness declined
11 and his attendance became erratic. Appellant completed his inspection reports three to five months
12 after performing inspections. Appellant was suffering from extreme lethargy, tiredness, lack of
13 energy, and shortness of breath.

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15 2.7 In 1999, Appellant provided Mr. Parker with information from his physician, Dr. Robert
16 Fink. Dr. Fink diagnosed Appellant with Attention Deficit Disorder and major depression, but
17 indicated that Appellant could perform the essential functions of his position with or without
18 accommodation. Appellant reported that he had the following disability related limitations:

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- Problems "focusing" on specific tasks;
 - Problems getting up in the morning because he felt his sleeping pills were too strong;
 - Became easily distracted and forgot where he "left off";
 - Problems with side effects of medications.
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1 2.8 To assist Appellant in performing his duties, the agency provided the following
2 accommodations:

- 3 • The agency set up work performance improvement plans that broke the work into shorter
- 4 tasks and set short-term goals.
- 5 • The agency asked Appellant to let his phone calls bounce to voice mail to minimize
- 6 disruptions.
- 7 • Appellant began working in a conference room away from the phone.
- 8 • The agency provided Appellant with a weekly planning document and frequent meetings
- 9 with his supervisor.
- 10 • The agency allowed Appellant two days to organize and clean his work area.
- 11 • Appellant kept a fan on for “white noise.”
- 12 • Appellant organized his work notes with 3-M flags for easy location.
- 13 • Arrangements were made for Monday morning inspection tracking reports, establishing a
- 14 weekly work plan, and meeting with his supervisor.
- 15 • Appellant met with his supervisor before and after inspections.
- 16 • Appellant’s e-mail activities were limited to scheduled times.

17 2.9 Despite these efforts, Appellant continued to have difficulty in performing the essential
18 functions of his job. He was not able to complete his inspection reports until six months after the
19 inspections. Appellant’s problems included difficulty focusing on inspection activities and
20 completing work assignments, arriving late to work and keeping erratic hours, missing
21 appointments and deadlines, and lack of productivity.

22 2.10 On December 8, 1999, Cynthia Kent, Human Resource Consultant, wrote a letter to Dr. Fink
23 to ask for information that would assist the agency in accommodating Appellant’s disability. Dr.
24 Fink indicated that he was trying different medications for Appellant, and in the meantime it would
25 be helpful if the agency could lessen Appellant’s pressure and deadlines. Unfortunately, the agency
26 could not adjust Appellant’s core hours or the work deadlines which were established by statute.

1 2.11 On April 20, 2000, Ms. Kent requested additional information from Dr. Fink. Dr. Fink
2 reported that Appellant's mental health condition was permanent and he was not able to identify
3 any specific accommodations for Appellant. Ms. Kent, Mr. Parker, and Appellant began to meet to
4 discuss ideas on how to assist Appellant; however, they continued to be unsuccessful in improving
5 the situation.

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7 2.12 On December 27, 2000, Ms. Kent wrote to Dr. Fink again. Ms. Kent described the agency's
8 attempts to date and subsequent lack of success in assisting Appellant to perform satisfactorily. Dr.
9 Fink responded that Appellant's diagnosis was poor, it was unlikely that he would change for better
10 or worse, and his condition was permanent. Dr. Fink again recommended that the time limitations
11 and stress be avoided in order for Appellant to perform his job duties.

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13 2.13 The agency arranged an independent medical examination for Appellant. Dr. Michael
14 Friedman, a psychiatric physician, and Dr. Farwell, a neurologist, examined Appellant and
15 submitted their conclusion reports on April 19, 2001. Dr. Farwell did not diagnose Appellant with
16 any neurological problems; however, she stated in her report that Appellant had "aortic stenosis"
17 since 1992. Dr. Friedman reported that Appellant's psychological condition was a permanent
18 disability. Dr. Friedman concluded that Appellant's limitations affected his ability to perform the
19 essential functions of his position such as preparing inspection reports, staying on task, and the
20 timely completion of his work. After reviewing the accommodations that had been attempted so
21 far, Dr. Friedman stated that the agency had done all they could to assist Appellant.

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23 2.14 After reviewing the results of the independent medical examination, Kerry Ivey, Regional
24 Administrator, asked Ms. Kent to explore the possibility of alternative positions with essential
25 functions that Appellant could perform. Appellant indicated that he needed to remain at his current
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1 salary. The agency was not successful in locating a position that accommodated Appellant's
2 limitations or salary requirements.

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4 2.15 Appellant's productivity continued to decline. Appellant averaged one inspection per
5 month, and he failed to complete any reports between January and May of 2001. This production
6 level was far below the agency's minimum production goals of 3.3 inspections per month.

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8 2.16 In May 2001, Appellant learned that his aortic valve stenosis was a serious problem that
9 required surgery. The aortic valve stenosis prevented proper oxygenation because the aortic valve
10 was 90 percent closed. Appellant notified the agency that he needed to take medical leave to have
11 aortic valve replacement surgery. His surgery, to be performed by Dr. Nieto, was scheduled for
12 June 14, 2001.

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14 2.17 Ms. Ivey had begun to draft a disability separation letter for Appellant; however, she
15 decided to postpone that action until after his surgery to avoid having a negative impact on his
16 recovery.

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18 2.18 Appellant underwent the surgery, and on August 29, 2001, he returned to work. That
19 morning, Ms. Ivey gave him a disability separation letter to be effective October 29, 2001. The
20 letter provided Appellant with information on how to get on the reduction-in-force register and
21 stated that Appellant could appeal the disability separation. The letter also stated that the disability
22 separation was based on the previous evaluations done by Dr. Fink and the independent medical
23 examinations. Appellant told Ms. Ivey that his condition had improved since having surgery.
24 Appellant also said that he had new information from Dr. Nieto to show that he would now be able
25 to perform normally in his position. Later that day, Appellant hand-delivered a June 15, 2001 letter
26 from Dr. Nieto that stated:

1 [Appellant] on June 14, 2001 had Aortic Valve Replacement for critical aortic stenosis. His
2 aortic valve was very critical in the nature of his disease. The valve would cause him to be
3 extremely lethargic, tired, lack of energy, short of breath, pronounced shortness of breath
4 with exertion, and certainly would have made him feel tired all of the time. When he goes
5 back to work he should have a pronounced increase in his energy level, endurance, and will
6 do very well. He was very concerned that he was not performing up to his normal standards
7 at work because of his symptomatology. This certainly would not be the case now, going
8 back to work he should be back to his normal self prior to his aortic stenosis that developed
9 and he should be back to what he was doing 6 months to 1 year prior. If you have any
10 questions, please feel free to contact me.

11 2.19 After delivering the letter from Dr. Nieto, Appellant went home and remained on unpaid
12 leave status because he concluded that the disability separation letter meant that the agency did not
13 want him to work any longer. Appellant did not realize that he could have continued working until
14 October 29, 2001. The agency did not contact Appellant to inquire as to why he did not return to
15 work after receiving his disability separation letter.

16 2.20 On August 31, 2001, Ms. Ivey sent a letter to Appellant notifying him that the letter from
17 Dr. Nieto “provided no information that would change the results of the Independent Medical
18 Examination” and she planned to proceed with the disability separation. She reminded Appellant
19 that he could appeal her decision, which he decided to pursue.

20 2.21 On January 17, 2002, Dr. Fink evaluated Appellant and he agreed with Dr. Nieto’s
21 conclusion that Appellant’s problems were caused by his cardiac condition and that he was no
22 longer disabled after the aortic valve replacement surgery. Dr. Fink determined that Appellant was
23 able to perform all the duties of his Industrial Hygienist position without any limitations and
24 without the need for accommodations.

1 2.22 On February 7, 2002, Ms. Kent sent a letter to Appellant recommending that he send his
2 new medical information to the Department of Personnel and request to be put on the reduction-in-
3 force and promotional registers.

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5 2.23 On April 18, 2002, the agency sent Appellant for a second independent medical
6 examination. Both Dr. Friedman and Dr. Farwell changed the conclusions of their earlier
7 evaluations as a result of the surgery Appellant received. Both doctors concluded that Appellant
8 was not disabled and was able to perform all the essential functions of his Industrial Hygienist
9 position without any limitations or accommodations.

10 11 **III. ARGUMENTS OF THE PARTIES**

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13 3.1 Respondent argued that the agency made numerous efforts to accommodate Appellant;
14 however, he was unable to perform the essential functions of his position with or without
15 accommodation. Respondent asserted that they were unable to find an alternative position that met
16 Appellant's accommodation or salary needs. Respondent contended that the June 15, 2001 letter
17 from Dr. Nieto did not change the agency's decision to separate Appellant because the disability
18 separation was due to a psychological (mental) condition rather than a heart (physical) condition.
19 Respondent argued that Dr. Nieto's letter indicated that Appellant would be able to perform work at
20 a level of six months to one year prior, which would not be adequate improvement because six
21 months prior to surgery Appellant was unable to overcome timeliness and productivity problems.
22 Respondent argued that Appellant did not provide the letter from Dr. Nieto until August 29, 2001
23 even though he had the letter in his possession since June 15, 2001. Respondent asserted that if
24 Appellant had followed their numerous suggestions to get on the reduction-in-force and
25 promotional registers, he most likely would have been hired from one of those registers with his
26 new medical information. Respondent contended that by the time the agency became aware that

1 Appellant could perform the essential functions of his position, the only available position was a
2 promotional position and Appellant had failed to get on the promotional register. Respondent
3 asserted that a disability separation was the only recourse based on the medical information and
4 diagnoses available at the time the separation was initiated.

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6 3.2 Appellant argued that the agency failed to obtain current independent medical evaluations
7 after receiving Dr. Nieto's letter. Appellant asserted that the agency erroneously relied on medical
8 reports that were completed prior to his heart surgery. Appellant contended that there was no
9 medical evidence indicating that he was disabled and not able to perform his job duties after the
10 surgery, at the time he was issued the separation letter and at the time the separation became
11 effective. Appellant argued that Ms. Ivey was not a medical doctor and did not have the
12 knowledge and training to diagnose whether there was a connection between a psychological
13 (mental) condition and a heart (physical) condition. Appellant asserted that the agency interpreted
14 Dr. Nieto's letter as stating that Appellant would be able to perform at a level of six months to one
15 year prior to surgery, when in fact Dr. Nieto meant six months to one year prior to the development
16 of the aortic stenosis. Appellant contended that he did not get on the reduction-in-force or
17 promotional registers because he believed that his performance history, his disability separation,
18 and the hiring freeze at the time would have prevented him from being hired. Appellant argued that
19 he instead appealed the disability separation as suggested by the agency as the proper course of
20 action if he disagreed with their decision.

21 22 **IV. CONCLUSIONS OF LAW**

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24 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter.
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1 4.2 At a hearing on appeal of a disability separation, the appointing authority has the burden of
2 supporting the action that was initiated. WAC 358-30-170. Respondent has the burden of proving
3 that Appellant was unable to perform the duties of the position as specified in the letter of
4 separation and that reasonable accommodation cannot be provided. Smith v. Employment Security
5 Dept., PAB No. S92-002 (1992).

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7 4.3 WAC 356-35-010(1) provides, in part, that an appointing authority “may initiate a disability
8 separation of a permanent employee only when reasonable accommodations cannot be provided.”

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10 4.4 The issue before us is whether Respondent complied with the provisions of WAC 356-35-
11 010 when it separated Appellant from his position as an Industrial Hygienist 2 due to disability.
12 WAC 356-05-120 defines a disability as “[a]n employee’s physical and/or mental inability to
13 perform adequately the essential duties of the job class.” In this case, there was no medical
14 evidence to prove that Appellant was disabled and unable to perform the essential duties of his
15 position at the time the agency initiated the disability separation on August 29, 2001.

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17 4.5 Appellant provided information from Dr. Nieto indicating that he was recovered and no
18 longer disabled. Dr. Nieto stated, “... he should be back to his normal self prior to his aortic
19 stenosis that developed and he should be back to what he was doing 6 months to 1 year prior.” We
20 acknowledge that Dr. Nieto’s letter was rather unclear, however, it should have put the agency on
21 notice that Appellant’s condition had changed between the time of the April 2001 evaluation and
22 his return to work following his surgery in August 2001.

23
24 4.6 The agency discounted the information provided by Dr. Nieto and instead relied on the
25 evaluation of Dr. Friedman, which was conducted prior to Appellant’s surgery. The agency failed
26 to refer Appellant back to Dr. Friedman for a post-surgery evaluation or make any other efforts to

1 obtain a current evaluation of his condition. Rather, the agency made a medical determination
2 without appropriate knowledge and medical training, and concluded that Appellant's disability was
3 based on a psychological (mental) problem rather than his heart (physical) condition and
4 erroneously continued with the disability separation process.

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6 4.7 The subsequent independent medical examination on April 18, 2002 provided clear evidence
7 that Appellant was no longer disabled after having the surgery and is able to perform all the duties
8 of his job without accommodation or limitation. The agency failed to re-evaluate Appellant's
9 condition after his return to work following surgery and instead proceeded with the disability
10 separation based on a four month old evaluation. Therefore, we conclude that Respondent has not
11 met its burden of proof that Appellant was disabled at the time the disability separation letter was
12 issued.

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14 4.8 The appeal of Richard Sirginson should be granted and he should be reinstated to the
15 employment status he held prior to his separation as an Industrial Hygienist 2 with full back pay and
16 benefits equivalent to what he would have earned had he been working his regularly assigned
17 schedule from the date of his disability separation on August 29, 2001. Appellant shall also be
18 entitled to payment for any vacation and sick leave that he would have accrued from August 29,
19 2001 to the present, and for holidays that the Respondent observed or could have granted Appellant
20 between August 29, 2001 to the present.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Richard Sirginson is granted and he is reinstated to the employment status he held prior to his separation as an Industrial Hygienist 2 with full back pay and benefits equivalent to what he would have earned had he been working his regularly assigned schedule from August 29, 2001 to the present. Appellant shall also be entitled to payment for any vacation and sick leave that he would have accrued from August 29, 2001 to the present, and for holidays that the Respondent observed or could have granted Appellant from August 29, 2001 to the present.

DATED this _____ day of _____, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Gerald L. Morgen, Vice Chair

Busse Nutley, Member